Supreme Court, U.S.
FILED
NOV 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-702

In The
Supreme Court of the United States
October Term, 1987

EUGENE DONG, JR., M.D.,
Plaintiff and Petitioner,

vs.

THE BOARD OF TRUSTEES OF THE LELAND STANFORD JUNIOR UNIVERSITY, *et al.*,
Defendants and Respondents.

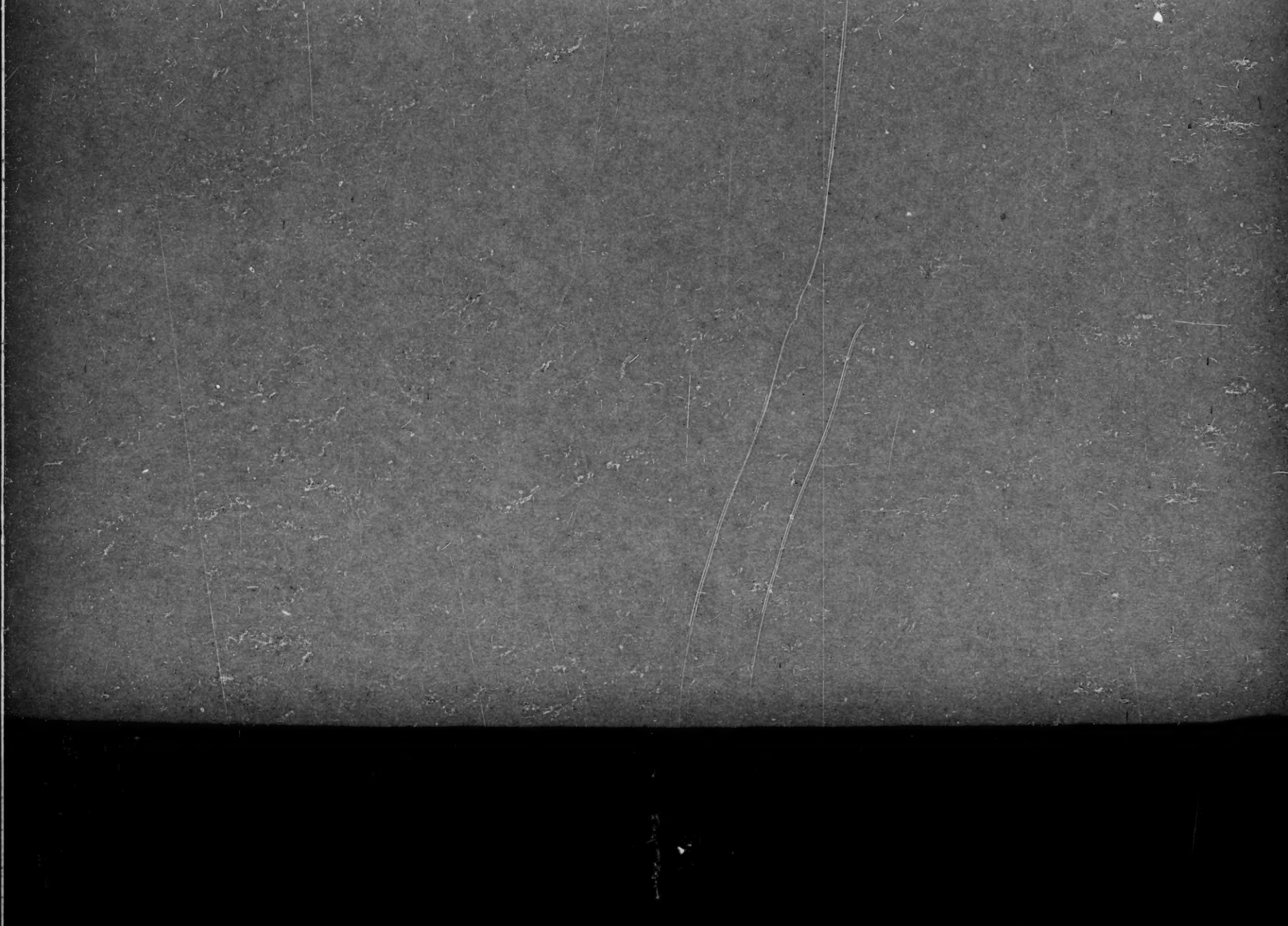
BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

McCutchen, Doyle, Brown & Enersen
David M. Heilbron
Robert L. Ebe
Three Embarcadero Center
San Francisco, CA 94111
Telephone: (415) 393-2000

Attorneys for Defendants and Respondents The Board of Trustees of the Leland Stanford Junior University, Dr. Clayton Rich, John Schwartz, Esq. and Dr. James B. D. Mark

November 20, 1987

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831



I. ISSUES PRESENTED FOR REVIEW

1. Does one have a federal Constitutional right to base a state common law defamation claim upon a publication found (correctly—or even incorrectly) to be non-actionable opinion under state common law?

2. Does one have a federal Constitutional right to introduce evidence ruled (correctly—or even incorrectly) irrelevant under state evidence law to claims purportedly made under state common law?

TABLE OF CONTENTS

		Page
I.	ISSUES PRESENTED FOR REVIEW	i
	TABLE OF CONTENTS	ii
	TABLE OF AUTHORITIES	iii
II.	INTRODUCTION	1
III.	STATEMENT OF THE CASE	2
IV.	SUMMARY OF ARGUMENT AND ARGUMENT	7
	A. Observations About Fact And Opinion	7
	B. Observations About Academic Freedom	9
CONCLUSION		10

TABLE OF AUTHORITIES

Page

CASES:

Board of Trustees v. Superior Court, 119 Cal. App. 3d 516 (1981) 1, 2

Gertz v. Robert Welch, 418 U.S. 328 (1974) 8

OTHER AUTHORITIES:

Restatement of Torts, § 566 8

United States Supreme Court Rule 17 1

Federal Rule 403 6

II. INTRODUCTION

Petitioner's claims against the Stanford respondents[1] were for emotional distress and alleged breach of the covenant of good faith and fair dealing. One State Court of Appeal found those claims "almost exquisitely preposterous." *Dong v. Board of Trustees,* ("Dong II"), Appendix to Petition, p. 43. Petitioner added that he was distressed by an investigation which vindicated him. An earlier State Court of Appeal looked at that notion (and others) in connection with a discovery dispute, and found there was "no argument in reason" to support it. *Board of Trustees v. Superior Court,* 119 Cal. App. 3d 516, 528 (1981) ("Dong I").

Petitioner's claims are indeed preposterous, and there is no argument in reason to support them. They are in any event state common law claims, and in this Court are based upon alleged errors in state court evidentiary rulings upon *in limine* motions in respect to those state law claims. The Petition presents no federal question, much less "special and important reasons" for review under Supreme Court Rule 17 or otherwise.

———o———

[1] The "Stanford respondents" are the respondents other than Dr. Lucas. They are the Board of Trustees of Leland Stanford Junior University; Dr. Clayton Rich (former Dean of the Stanford Medical School); John Schwartz, Esq. (Vice President and General Counsel of Stanford); and Dr. James B.D. Mark (former acting chair of the Department of Surgery at the Medical School).

III. STATEMENT OF THE CASE

A. The Facts

Drs. Dong and Lucas were members of the faculty of Stanford's Medical School. Lucas worked in the Department of Surgery; his field was kidney transplants. Dong worked in the Department of Cardiovascular Surgery; his field was heart transplants. Dong and Lucas each had medical students and postgraduate fellows working for him.

In early 1972 Drs. Dong and Lucas quarreled over two graduate students' time. Relations between them went from "chilly" to "frigid" by June 1973. Then one of Lucas' research associates, Dr. Morris, told Dong that Lucas had not experimented on all the rats his publications said he had. Thereupon Dong wrote a memo to the Chair of the Department of Surgery that "made complaint . . . against Dr. Lucas, charging research misconduct and seriously impugning his personal and professional integrity." *Dong I*, 119 Cal. App. 3d at 522.

"Successive faculty committees [at Stanford] were appointed to investigate that, and other, complaints [by Dong] against Dr. Lucas"; indeed, "five years of complaints and recriminations" followed. *Dong I*, 119 Cal. App. 3d at 522-23.

Dong did not confine his complaints about Lucas' rats to University committees. He also brought his charges to the attention of the National Institute of Health, Senator Kennedy, the U.S. Attorney, the FBI, two professional journals, the American Association of University Professors, and the San Francisco Bay Area press. Then he wrote a book about, among other things, Lucas and

his rats. The idea that Dong's academic freedom with respect to Dr. Lucas was impaired (Petition, pp. 36-41) is, to say the least, fantasy.

Lucas on his part had sent some charges against Dr. Dong to one of the committees that was investigating him, Lucas, but the committee did not consider them. Lucas filed those same charges again a few years later, and another committee did look at them briefly. Those are the charges which the Petition claims were fact, not opinion. (Petition, pp. 15-36)

The upshot of all these charges and countercharges within the University was this: Dong was vindicated, and Lucas was punished. Lucas' charges against Dong were dismissed by the committee which looked at them, forthwith. Lucas was found guilty of misconduct in misstating bibliographies given to the NIH and of incompetence in connection with research. Accordingly, in February 1979 Stanford suspended Lucas for 12 weeks without pay and placed him on probation for two years. Lucas has since left Stanford. The University does not know where he is.

Dr. Dong was nevertheless unhappy with the result, and sued. He claimed that the charges Lucas had filed against him and which the University had dismissed had defamed him (first and second cause of action); that Stanford had defamed him and put him in a false light by, in general, failing to find Lucas guilty enough, early enough, and not telling the public and the NIH how guilty Lucas was (third cause of action); that distressed Dong (fourth and fifth causes of action); and that it also breached Dong's contract (sixth cause of action). (See *Dong II*, Appendix to Petition, pp. 23-26).

Petitioner adds that he used to be paid "commensurately with his peers," but now he is paid "at only the 25th percentile for associate professors at Stanford. . . ." (Petition, p. 3). Perhaps so. Petitioner does not report, however, that he has essentially done no teaching, research or clinical work in his field since 1977. Instead, he wrote a novel, appeared in a TV movie, went to law school, passed the bar, and spent his time writing about Dr. Lucas, this lawsuit and the like.

If he is paid less than other professors, that is why.

B. Proceedings Below

Dong's defamation and privacy claims against Stanford were dismissed on summary judgment before trial (Dong did not appeal that ruling below and cannot here). That left Dong's defamation claim against Lucas, and his emotional distress and breach of contract claims against Stanford.

1. The Claims Against Stanford

At trial Dong planned to introduce evidence of Lucas' rat research and Stanford's investigation of it to prove Dong's claims against Stanford. Specifically, Dong wanted to put in evidence these documents and testimony:

> The lab notebooks (partly in Japanese) of Dr. Enomoto, who used to work in Lucas' lab;
>
> A handwriting expert (who apparently did not read Japanese) to say these notebooks could have been altered;
>
> Martins, who was Lucas' adversary elsewhere, to say why he thought Lucas and Enomoto worked on fewer

rats than they said they did while Martins worked in Lucas' lab on his own animals;

Morris, Lucas' former lab assistant, to say why he thought Lucas did not work on as many rats as Lucas said he did and why Morris thought Lucas had not labeled the animals' blood properly in 1970;

Dong's own charges against Lucas which he had filed with the University, numbering more than 50 single-spaced pages, plus the University's confidential reports as to all charges against Lucas;

The Medical School's current dean, former dean, counsel, former associate counsel, associate dean, department chair and others, all of whom Dong had noticed to appear for interrogation regarding those confidential reports on Lucas and the investigation of Lucas that related to them;

NIH memos relating to Stanford's communications about the investigation of Lucas, and which the trial court had held absolutely privileged—to which Dong agreed.

Thus Dong offered to prove that Lucas had not reported his rat experiments correctly and that Stanford had not found him guilty enough, early enough. This, however, was Dong's case, not Lucas' case, and it was supposed to be about what was done to Dong, not Lucas. Accordingly, Stanford moved *in limine* to exclude that evidence.

The trial court granted the motion upon the grounds, among others,[2] that it was not relevant "and even if rele-

---

[2] The trial court also recognized the California Constitutional right to privacy (RT 31) and found NIH documents embodying Stanford's communications to the NIH privileged. (RT 41) Petitioner agreed "you cannot sue or create or base a cause of action on communications with the NIH." (RT 39, ll. 19-24)

vant under 352 of the Evidence Code [like Federal Rule 403] the danger of confusing the jury and taking up additional time on evidence that is so marginally relevant and has so little probative value is unwarranted." (RT 31, 38, 41)

Stanford also moved *in limine* to exclude evidence of the investigations that had vindicated Dong. Dong advised the Court that it did not matter how the Court ruled on that motion, because he could not prove his alleged case as to the Dong investigations without proving his case about Lucas' rat experiments. (RT 43) The Court granted the motion. (RT 48)

2. The Claims Against Lucas

Lucas moved *in limine* to exclude his letters charging that Dong may have committed scientific improprieties on the ground that they set forth opinions, not statements of fact. Dong advised that the Court should take the letters "as a whole", not line by line, in making that determination. The Court agreed, and ruled that "clearly taken as a whole this is opinion rather than fact. . . . " (RT 21-22).

Dong also claims here that Stanford is responsible for Lucas' alleged defamatory opinion on a respondeat superior theory, although he dropped that claim in the Court of Appeal.[3]

---

[3] There is also nothing to the claim. The claim is based on the letters Lucas sent to the University charging that Dong may be guilty of scientific improprieties. Dr. Dong in fact claimed that a professor has a duty to bring such charges to the University's attention, and that the University has a duty to receive

(Continued on following page)

3. The Court's Rulings

After the Court's *in limine* rulings, petitioner asked it to enter judgment of nonsuit against him. (RT 41-42, 48-49) Respondents stipulated to that, noting that they believed petitioner had no claim before or after the Court's rulings *in limine*. (RT 52) The Court entered the judgment of nonsuit for which petitioner had asked.

The Court of Appeal affirmed the judgment, and the Supreme Court of California denied a petition for hearing. This petition followed.

———o———

IV. SUMMARY OF ARGUMENT AND ARGUMENT

Petitioner's observations about the difference between fact and opinion are wrong and in any event identify no ground for review. (A, below) Petitioner's observations about academic freedom are, as the Court of Appeals put it, "absurd", and also identify no ground for review. (B, below)

A. Observations About Fact And Opinion

Petitioner points out that the California Supreme Court has adopted the "totality of the circumstances test"

(Continued from previous page)

and look into those charges. Stanford cannot be liable for discharging the duty Dong claimed it had. Moreover, as a matter of common sense a University cannot be liable for receiving charges of one faculty member against another. For if it could not receive them, it could not discharge its duty to look into them.

for distinguishing fact and opinion, and complains that the "difficulty" with that test is that "the factors described are merely tools of linguistic analysis." (Petition, p. 17)

However:

(1) Petitioner told the trial court and the California Supreme Court[4] that the "totality of the circumstances" test was the right test (p. 6, above), and it is. Restatement of Torts, § 566.

(2) Petitioner does not say how that test was misapplied here, and it was not.

(3) It would make no difference whether the test were wrong or misapplied, because (a) it is a state common law test, and (b) because the State found that petitioner had no defamation claim under it.

In some circumstances the Constitution may prohibit a state from entertaining a defamation claim for damages based upon what under federal law is the expression of opinion, not fact. *See, e.g., Gertz v. Robert Welch,* 418 U.S. 328, 339-40 (1974). But no constitutional precept *requires* a state to entertain a defamation claim for what under state law is the expression of opinion, not fact, whether or not under federal law the expression is opinion or fact. Indeed, no constitutional precept requires a state to entertain a claim for defamation (or other state torts) at all.

---

[4] He told the Supreme Court, for example, that "the questioned publication must be considered in its entirety." (Pet. for Hearing, pp. 16-17).

B. Observations About Academic Freedom

Petitioner apparently complains that the First Amendment is somehow offended where (1) one university professor "charges" another with fraud, and (2) the University does not thereupon deliver the charged professor's private papers to his accuser. (Petition, p. 40)

However: (1) The proposition is an "absurdity." (*Dong II,* Appendix to Petition, p. 45) (2) Petitioner's complaint is directed to an evidentiary ruling upon a motion *in limine.* The ruling was based upon the ground, among others, that the evidence petitioner offered was irrelevant to any element of his alleged common law claims. (*Dong II,* Appendix to Petition, p. 43-44) That ruling was plainly right; petitioner does not say how it was not right; and petitioner would present no federal question even if it were wrong.

Petitioner concludes with a request for an advisory ruling. (Petition, pp. 41-43) He is not entitled to it. (Constitution, Article III)

———o———

CONCLUSION

This lawsuit should end. The petition should be denied.

Respectfully submitted,

McCutchen, Doyle, Brown
& Enersen
David M. Heilbron
Robert L. Ebe
Three Embarcadero Center
San Francisco, CA 94111
Telephone: (415) 393-2000

Attorneys for Defendants and Respondents The Board of Trustees of the Leland Stanford Junior University, Dr. Clayton Rich, John Schwartz, Esq. and Dr. James B. D. Mark

November 20, 1987